

North Dakota's Water Permitting Process



Scan for more information about water permits.

When is a permit required to use water in North Dakota?

A permit is required for all uses of water, except in cases when both the amount of water to be impounded, diverted, or withdrawn is less than 12.5 acre-feet, and the contemplated use is domestic, livestock, or fish, wildlife, and other recreational uses. Although no permit is required for these uses, the State Engineer must be notified of the location and the acre-feet capacity, stored or utilized, once the facilities are constructed. A permit may be applied for in order to establish a priority date for these uses.

Background People settling in North Dakota learned that a long-term deficit of precipitation, such as occurred in the “Dirty Thirties,” presented a significant obstacle to meeting the potential of the state in terms of water supply for people, agriculture, and industry. In 1889, the authors of the State Constitution stated in Article II, Section 3: “All flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating and manufacturing purposes.” The State Century Code (NDCC 61-01-01 and 61-04.1-01) defines waters of the state as:

1. Waters on the surface of the earth, excluding diffused surface waters but including surface waters whether flowing in well-defined channels or flowing through lakes, ponds, or marshes which constitute integral parts of a stream system, or waters in lakes;
2. Waters under the surface of the earth whether such waters flow in defined subterranean channels or are diffused percolating underground water;
3. All residual waters resulting from beneficial use, and all waters artificially drained; and
4. All waters, excluding privately owned waters, in areas determined by the State Engineer to be noncontributing drainage areas. A noncontributing drainage area is any area that does not contribute natural flowing surface water to a natural stream or watercourse at

an average frequency more often than once in three years over the latest thirty-year period.

5. The moisture contained in the clouds and atmosphere within the state boundaries. All water derived as a result of weather modification operations shall be considered a part of North Dakota's basic water supply and all statutes, rules, and regulations applying to natural precipitation shall also apply to precipitation resulting from cloud seeding.

In order to administer the law governing the use of the state's water resources, the Office of the State Engineer was created by the legislature in 1905.

North Dakota uses the prior appropriation doctrine as the foundation for establishing water rights. Under this doctrine, the first user of water acquires a priority for the use of that water; the location of a landowner's property with respect to the water source is not a factor in determining a water right. This principle is sometimes referred to as “first in time is first in right.”

The commitment to manage North Dakota's water resources was reinforced in 1937, with the creation of the State Water Commission. The desire for orderly development of the state's water resources was again evident in 1945, when the State Water Commission and the United States Geological Survey initiated a cooperative groundwater survey

Water Permitting Process

program to inventory the state's groundwater resources. In 1985, North Dakota became the first state in the nation to complete such a program.

Today, the State Engineer regulates water resources development, while the State Water Commission supports development, through technical assistance and cost-share.

The Water Permit The State Engineer administers the procedure for obtaining a conditional water permit. A conditional water permit reserves a specified volume of water for a specified use, subject to conditions that are a part of the permit. The conditions protect prior appropriators and the public interest.

The initial step in acquiring a water permit is to obtain and complete the application form. The form is submitted to the State Engineer with the required map and application fee. The fee varies from \$100 for recreational, livestock, and fish and wildlife use, to \$750 for an industrial use permit for volumes in excess of one cubic foot per second or in excess of 724 acre-feet annually. The priority date is established when the application is received by the State Engineer.

When the State Engineer receives a completed application, the applicant is instructed to send a "Notice of Application" by certified mail to all record title owners of real property and water permit holders within a one-mile radius of the point of diversion, as well as all municipal or public water use facilities within a 12-mile radius of the proposed point of diversion. Exceptions for the need to notify all real property owners are as follows:

1. If the one-mile radius extends within the geographical boundary of a city, the notice must be given to the governing body of the city and no further notice need be given to the record title owners of real estate within the geographical boundary of the city.
2. If the one-mile radius includes land within the geographical boundary of a rural subdivision

Definitions

abeyance – a permit status for when only a portion of a requested volume of water in an application is conditionally approved.

acre-foot - the volume of water (325,851 gallons) that will cover an area of one acre to a depth of one foot.

beneficial use - a use of water for a purpose consistent with the best interests of the people of the state.

canceled water permit – the situation where a conditional water permit is canceled and the water permit or right is forfeited by the permit holder for not putting the permitted water to beneficial use without justifiable cause.

conditional water permit - an authorization to appropriate a specified volume of water from a designated source and location for a specified beneficial use within a certain period of time.

consumptive use - water which is withdrawn and will not be available for immediate reuse.

deferred (withheld) water permit – a situation where the permit application has fulfilled all administrative criteria, but additional information (hydrologic data collection, review and analysis) needs to be gathered before action can be taken.

denied water permit – situation where the permit application has fulfilled all administrative requirements but hydrological analysis indicates that the permit cannot be approved in accordance with the criteria for issuance of a permit.

domestic use - the use of water by an individual, a family unit, or a household for personal needs and for household purposes, including, heating, drinking, washing, sanitary, and culinary uses; irrigation of land not exceeding five acres (2.0 hectares) in area for gardens, orchards, lawns, trees, or shrubbery; and for household pets and domestic animals kept for household sustenance and not for sale or commercial use, when the water is supplied by the individual or family unit.

fish, wildlife, and recreation use - the use of water for the purposes of propagating and sustaining fish and wildlife resources and for the development and maintenance of water areas necessary for outdoor recreation activities.

industrial use - the use of water for the furtherance of a commercial enterprise wherever located, including, manufacturing, mining, or processing.

irrigation use - the use of water for application to more than five acres (2.0 hectares) of land to stimulate the growth of agricultural crops, or the maintenance of recreation areas such as athletic fields, golf courses, parks, and similar types of areas, except when the water for the facility is provided by a municipal water system.

livestock use - the use of water for drinking purposes by herds, flocks, or bands of animals kept for commercial purposes.

municipal or public use - the use of water by the state through its political subdivisions, institutions, facilities, and properties, and the inhabitants thereof, or by unincorporated communities, subdivision developments, rural water systems, and other entities, whether supplied by the government or by a privately owned public utility or other agency or entity, for primarily domestic purposes as defined herein.

non-consumptive use - water that is diverted and returned to the source. It is considered to be non-consumptive water if the composition has not been substantially altered and it is returned to the source from which it was withdrawn in a relatively short period of time.

perfected water permit - verifies that the permittee has applied water to beneficial use in accordance with the terms and conditions of the conditional water permit.

point of diversion - the geographic location from which water is diverted to be put to beneficial use; examples include wells, water storage dams, diversion dams, dugouts, pump sites along a surface water source, etc.

void water permit – situation where an application has been filed, but the applicant did not complete the process.

water right - a legal right to use a specified amount of water for a beneficial purpose.

where the lots are of ten acres or less, the notice must be given to the governing body of the township or other governing authority for the rural subdivision and no further notice need be given to the record title owners of real estate within the geographical boundary of the rural subdivision.

3. If the one-mile radius includes a single tract of rural land which is owned by more than ten individuals, the notice must be given to the governing body of the township or other governing authority for that tract of land and no further notice need be given to the record title owners of that tract.

The notice includes the locations and use of appropriation, the amount of and purpose for which the water is to be used, the applicant's name and address, and the newspaper in which the notice of the water permit application will be published. The notice also states that the notice published in the newspaper will contain a date by which any person having an interest in the application may file written comments regarding the proposed appropriation with the State Engineer.

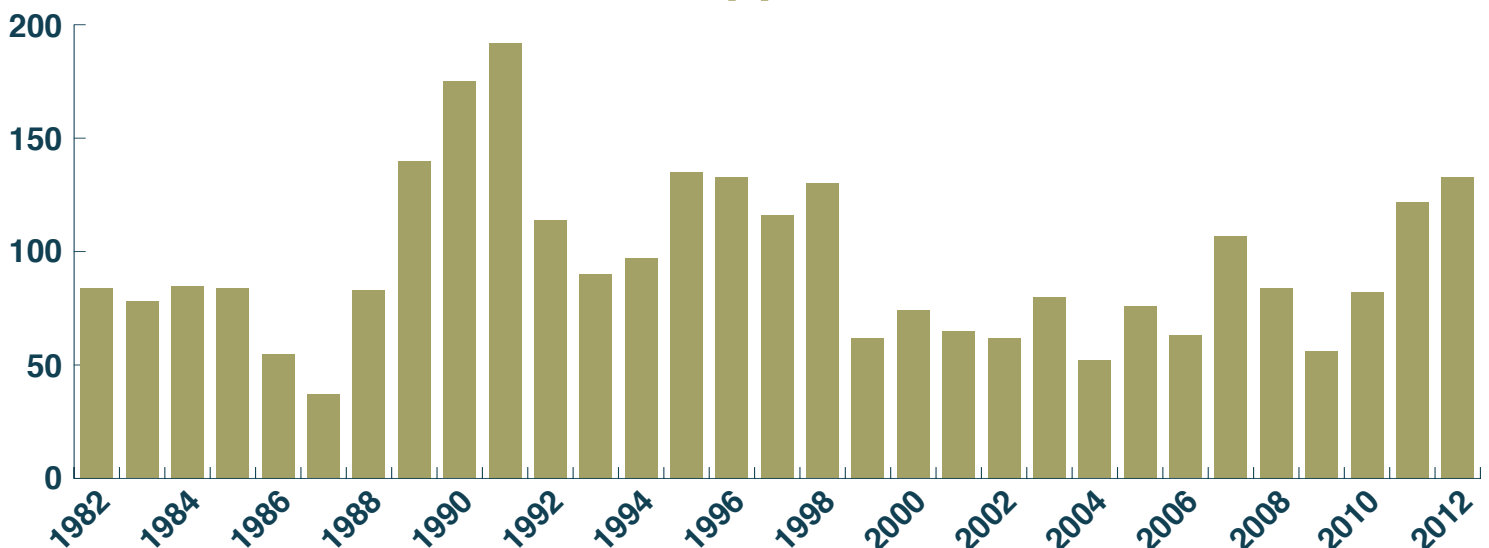
After notice of application has been mailed to those required, the applicant completes an affidavit of notice and returns it to the State Engineer by certified mail. The affidavit of notice must state how

the applicant determined the record title owners and must list the names and addresses of those who were sent notices by certified mail.

Upon receipt of the completed affidavit, the State Engineer publishes a notice of the water permit application in the official newspaper of the county in which the proposed point of diversion is located. The notice is published once a week for two consecutive weeks. The notice will specify the date by which any person having an interest in the application may submit written comments to the State Engineer and must state that anyone who files written comments with the State Engineer will be mailed a copy of the State Engineer's recommended decision on the application. A copy of the notice will be sent to the applicant. The applicant pays the cost of publication.

Comments regarding a proposed appropriation must be in writing and filed with the State Engineer. The State Engineer will consider all written comments and provide a copy of the recommended decision to the applicant and any person who filed written comments. Within 30 days of service of the recommended decision, the applicant and any person who would be aggrieved by the decision and who filed written comments may file additional written comments with the State Engineer, request an adjudicative proceeding on the application, or

Number of Water Permit Applications Per Year (1982-2012)



Water Permitting Process

both. A request for an adjudicative proceeding must be made in the prescribed manner. If a request for an adjudicative proceeding is granted, the State Engineer will designate a time and place for the adjudicative proceeding and serve a copy of the notice of the adjudicative proceeding to the applicant and any person who filed written comments.

A water permit application must meet the following criteria:

- 1) The rights of a prior appropriator will not be unduly affected
- 2) The proposed means of diversion or construction are adequate
- 3) The proposed use of water is beneficial
- 4) The proposed appropriation is in the public interest

In determining the public interest, the State Engineer considers the following:

- 1) The benefit to the applicant
- 2) The effect on the economic activity
- 3) The effect on fish, wildlife, and recreational opportunities
- 4) The effect of loss of alternate uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation
- 5) Harm to other persons resulting from the proposed appropriation
- 6) The applicant's intent and ability to complete the appropriation

When a permit is granted, the permittee is given a period of time to put the water to beneficial use according to the conditions of the permit. The period of time given for development usually ranges from one to three years.

A water right is acquired when beneficial use of water is made in accordance with the terms of the

permit. After the water is put to beneficial use and the facilities are inspected in order to determine their capacity, safety, and efficiency, a perfected water permit is issued. The permit should be recorded with the county recorders office, as a water right is a property right.

The applications are competing, if the State Engineer receives them within 90 days of each other. If there are competing applications for water from the same source and that source is insufficient to supply all applicants, the State Engineer shall adhere to the following order of priority:

- 1) Domestic
- 2) Municipal
- 3) Livestock
- 4) Irrigation
- 5) Industrial
- 6) Fish, wildlife, and other outdoor recreational uses

A permit holder may lose the right to use water if there is a failure to:

- 1) Comply with the terms of the permit
- 2) Make regular beneficial use
- 3) Carry out directives of the State Engineer
- 4) Meet safety criteria for the facilities

In summary, a right to appropriate water can be acquired for beneficial use only as provided under Chapter 61-04 of the North Dakota Century Code, which in part states that beneficial use shall be the basis, the measure, and the limit of the right to the use of water. It should also be noted that if water is not put to beneficial use for a period of three successive years without good and sufficient cause, the permit is subject to cancellation.

The Temporary Permit The State Engineer administers the procedure for obtaining a temporary water permit that authorizes the use of water for up to a 12-month period. The State Engineer provides the application form for the temporary water permit. The applicant must indicate the reason for the permit, quantity of water needed, proposed point of diversion, type of use, place of use, rate of withdrawal, source of water, dates of proposed use, and applicant's address. There is no fee or notification requirement for a temporary water permit application. The State Engineer will evaluate the request, and if it is granted, the State Engineer will list on the temporary authorization conditions that govern the appropriation. A temporary water permit does not result in a water right.

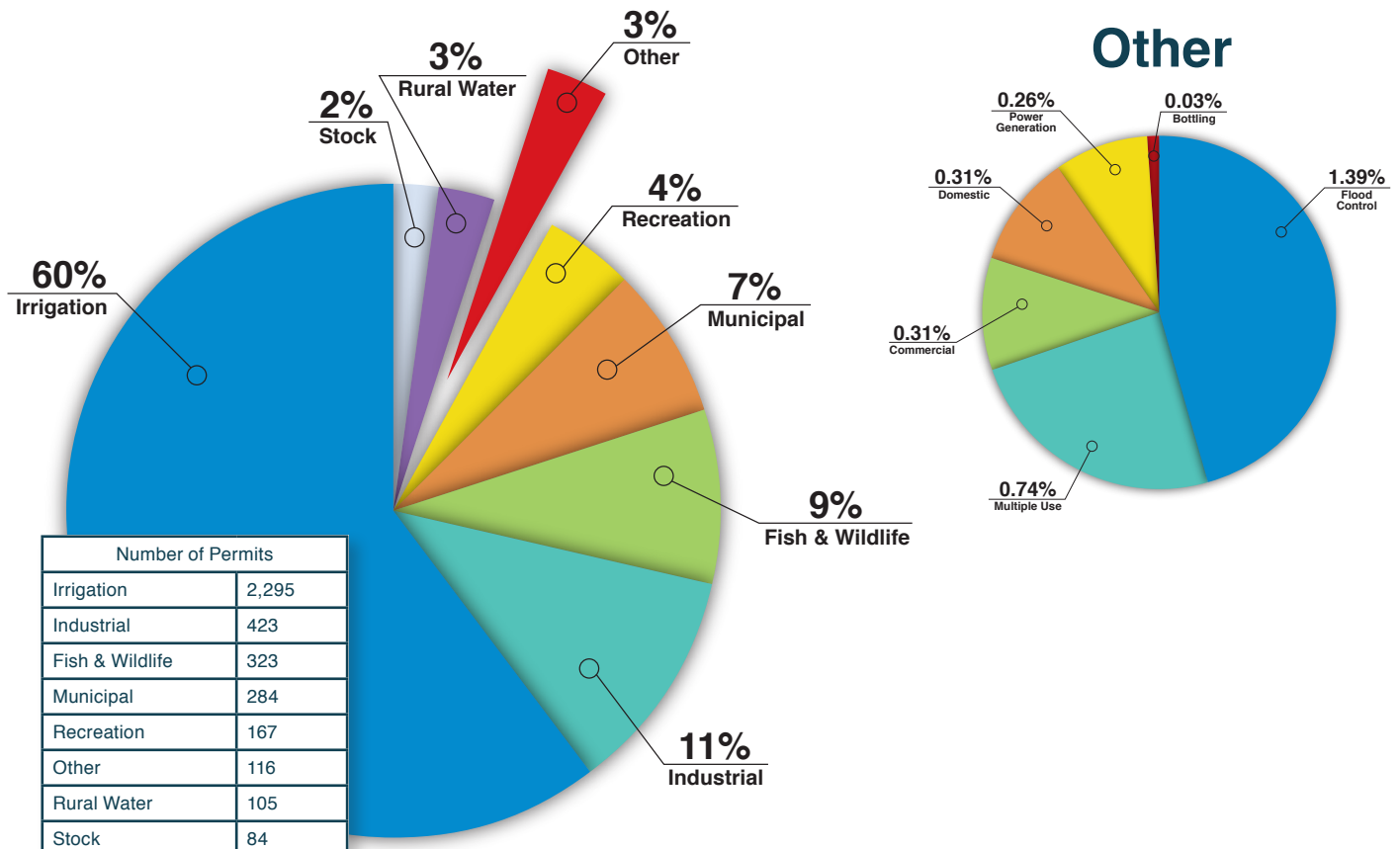
Temporary Water Permits For Industrial Use In Lieu Of Irrigation In response to the historically high water needs in North Dakota due to the oil boom, the State Engineer developed a new policy granting temporary authorization for holders of existing irrigation water permits to use water for industrial purposes.

The process uses the standard temporary water permit application form and allows the holder to utilize water from an approved irrigation water use permit for industrial use, as long as the permit holder follows certain guidelines. For more information, please see the "Permits and Applications" on the Water Commission website.

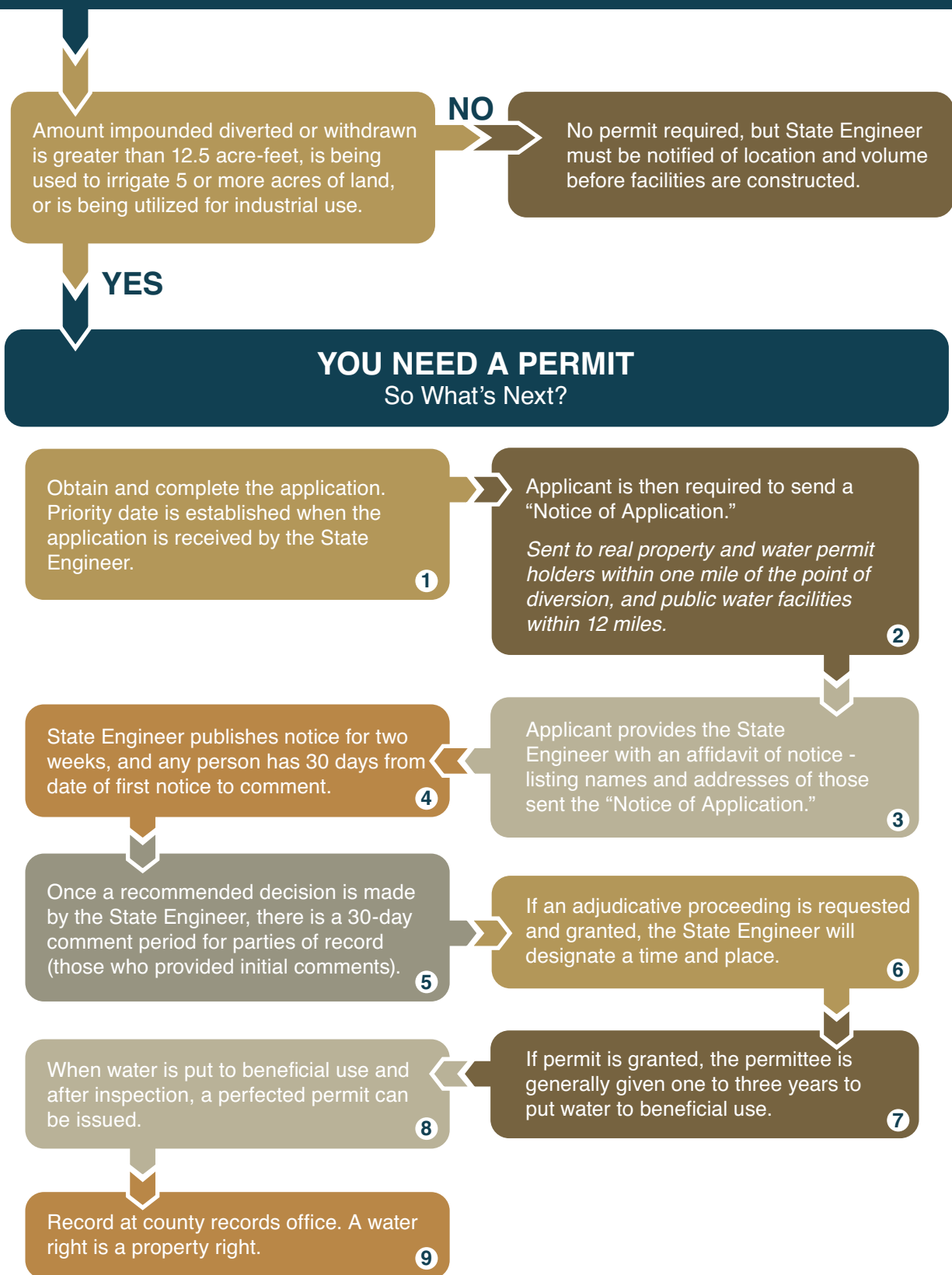


Scan for more information about temporary permits.

Total Water Permits By Type Of Use *As Of March 2013*



North Dakota's Water Permitting Process



For Additional Information



ND STATE WATER COMMISSION
900 E. BOULEVARD AVE., DEPT 770
BISMARCK, ND 58505
(701) 328-2754 · www.swc.nd.gov
Email swc@nd.gov